86-988

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

L. D. JAMESON,

Petitioner,

vs.

BETHLEHEM STEEL CORPORATION PENSION PLAN OF BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES, also known as BETHLEHEM 1977 SALARIED PENSION PLAN, GENERAL PENSION BOARD, BETHLEHEM STEEL CORPORATION AND SUBSIDIARY COMPANIES,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. MAY A PENSION PLAN ADMINISTRATOR DENY BENEFITS FOR COVERED EMPLOYMENT UNDER THE EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974 (ERISA), SECTION 203(a)(b)(F), 29 U.S.C. SECTION 1053 (a)(b)(F), ON THE BASIS OF A PRE-ERISA BREAK-IN-SERVICE POLICY SEPARATE FROM THE QUALIFIED PLAN IN EFFECT AT THE APPLICABLE TIME AND WHERE THE BREAK-IN-SERVICE RULES OF THE PLAN IN FORCE WHEN THE APPLICATION FOR PENSION WAS MADE DID NOT CONTAIN THE POLICY OR EXPRESSLY REFER TO IT.

2. WHETHER A PRE-ERISA COMPANY POLICY OUTSIDE OF THE QUALIFIED PENSION PLAN IN EFFECT, WHEREBY AN EMPLOYEE SUFFERS A BREAK IN SERVICE AND THEREBY LOSES ACCRUED PENSION CREDITS FOR FAILURE TO REPAY A SEVERANCE ALLOWANCE WHICH WAS DUE HIM UPON TERMINATION OF EMPLOYMENT AT ONE FOREIGN OPERATION OF THE COMPANY AND TRANSFER TO ANOTHER IS AN EMPLOYEE PENSION PLAN UNDER SECTION 3(3), (2)(A) OF ERISA, 29 U.S.C. SECTION 1002(3), (2)(A), (1982).

PARTIES TO PROCEEDING

The parties to this proceeding are the following: L. D. Jameson and Bethlehem Steel Corporation Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies, also known as Bethlehem 1977 Salaried Pension Plan, General Pension Board, Bethlehem Steel Corporation and Subsidiary Companies.

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, L. D. Jameson, respectfully prays that a writ of certiorari

issue to review the judgment of the United States Court of Appeals for the Third Circuit entered in this proceeding on September 26, 1986.

OPINIONS BELOW

The opinion of the District Court for the Eastern District of Pennsylvania, which is unreported at the time of the preparation of this petition, and the unpublished opinion of the Court of Appeals, appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals was rendered on September 26, 1986. The Court's jurisdiction is invoked under 28U.S.C., Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Code, Title 29:

Section 1053(a).

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age....

Section 1053(b)(1).

> In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of the employees' years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
>
> (F). Years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date.

STATEMENT OF THE CASE

The material facts are not in dispute.

The petitioner, L.D. Jameson, was a management employee in Venezuela of the Iron Mines Company of Venezuela ("IMCOV"),

a wholly owned subsidiary of Bethlehem Steel Corporation, from May, 1953 to February 28, 1970. On March 1, 1970, Jameson was transferred to Bethlehem's operation in Spain and continued in the employ of Bethlehem Steel until February 29, 1980.

By virtue of the law of Venezuela, Jameson was entitled to and received from Bethlehem a termination benefit in the nature of a severance allowance, designated as "Cesantia and Antiguedades," ("C & A"), when his assignment with IMCOV terminated in 1970. The National Labor Law of Venezuela provided the "C & A" is a vested right which cannot be waived under any circumstances.

At the time of Jameson's transfer to Bethlehem's operation in Spain in 1970, he was given an option, under a Bethlehem policy, of refunding the "C & A" and receiving pension credit for the years of service in Venezuela, or of retaining the payment and being classified as a new employee, with the consequent loss of credit, for pension purposes, for his years of service in Venezuela. Jameson

did not refund the "C & A." As a consequence, Bethlehem considered Jameson's transfer to Spain as a "break in service," and thereby classified him as a new employee as of that date.

Jameson resigned on February 29, 1980, and applied for a regular pension and other retirement benefits to which he was entitled for the years of service to Bethlehem. Because Jameson had not refunded the "C & A," the Pension Board, relying on the company policy in effect in 1970, refused to include the Venezuela years in computing his pension benefits. The Pension Board determined that Jameson was entitled only to a deferred pension based on ten years of service -- from March 1, 1970 to February 29, 1980.

Neither the pension plan in effect when Jameson was transferred from Venezuela to Spain in 1970, nor the plan document in force in 1980 when he resigned, contained a provision that refusal to refund "C & A" upon reassignment of employment would constitute a break in service.

REASON FOR GRANTING THE WRIT

THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS CONCERNING THE INTERPRETATION OF 29 U.S.C., SECTION 1053(a)(b)(1)(F).

ERISA provides in pertinent part that in computing the period of service under the plan for purposes of determining the nonforfeitable percentage of service under subsection (a)(2), 29 U.S.C., Section 1053(a)(2), all of an employee's years of service in covered employment shall be taken into account, except that the Administrator may disregard "years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with regard to breaks in service, as in effect on the applicable date." Section 203(b)(1)(F), 29 U.S.C., 1053(b)(1)(F).

The legislative history found in the House Conference Report with respect to the ERISA provisions relating to vesting and participation states:

> Generally, the vesting rules of the conference substitute are to apply to all accrued benefits, including

> those which accrued before the effective date of the provisions (subject, however, to the break-in-service rules discussed below).
>
> H.R. Conf. Rep. No. 93-1280, 93rd Cong., end Sess. 275, reprinted in [1974] U.S. Code Cong. & Admin. News, 4639, 5038, 5056.

Venezuelan law required Bethlehem's subsidiary operation in Venezuela, IMCOV, which employed Jameson, to pay him certain benefits known as "Cesantia" and "Antiguedades," a sort of severance allowance, at the time of the termination of his employment in Venezuela in 1970. Upon Jameson's transfer to Spain the very next day, Bethlehem's policy then in effect required Jameson to repay the severance allowance, or lose the accrued benefits for the years he had worked in Venezuela.

In 1980 when Jameson applied for a pension, the Plan Administrator treated Jameson's refusal to repay the "C & A" monies when he was assigned to Bethlehem's operation in Spain in 1970 as a break in service, on the basis of company policy in effect at that time. As a result, the respondent refused to include Jameson's

accrued credits for 17 years of covered service in Venezuela, in the calculation of his pension benefits.

It is significant that the pension plan in effect in 1970 had no "break-in-service" rules and contained no provision to the effect that a refusal to repay "C & A" monies upon cessation of employment in Venezuela and transfer to another Bethlehem operation would be deemed to be a "break in continuous service." And neither was such a provision inserted in the pension plan which was amended on July 31, 1977, following the enactment of ERISA. However, after the effective date of ERISA, the plan did provide for break-in-service rules. Section 5.1 defines "break in continuous service" and sets forth the consequences of such a break for pension purposes.

The "break-in-service" rules enacted in 1977 by amendment are substantially similar to those listed in Internal Revenue Regulation 1.410(a)-7. These rules apply to pre-1976 service as well as subsequently thereto. I.R. Regulation 1.410(a)-7

lists only the following causes for breaks in service: "quit; discharge; retirement and absence in excess of one year." Section 5.1 of the present Plan meets these minimum requirements of the Regulation. The Regulation also requires: "...a Plan to take into account the period of time which elapses while the employee is employed (i.e., while the employment relationship exists) with the employer or employers maintaining the Plan...." Jameson's continuous service commenced on the date of his initial employment date, May 5, 1953, and ended without interruption with his retirement on February 29, 1980.

The threshold question is whether the Plan Administrator may disregard the petitioner's years of employment in Venezuela by reason of a company policy outside of the pension plan in effect in 1970 when petitioner was terminated in Venezuela and immediately transferred to another company operation. The language of subsection (b)(1)(F) of 29 U.S.C., 1053, with respect to the break-in-service rule of the plan in effect on the applicable date, is

ambiguous. However, the issue is purely academic in the instant case, because neither the Plan in effect when the petitioner was terminated in Venezuela in 1970, nor the 1977 Plan which was effective at the time of the ruling on petitioner's application for a full pension, contained the company policy as a break-in-service rule.

The lower court determined that subsection (b)(1)(F) directed it to the 1968 Plan "as the plan in effect at the applicable date" and recognized that it must decide "whether that policy is, nevertheless, part of the 'plan in effect' in 1970." Conceding that the policy was outside of the plan in effect in 1970, the court found, however, that the subject policy was in itself a "pension plan" as defined by the Act, 29 U.S.C., Section 1002(3), (2)(A). As a consequence, the Court of Appeals concluded that the policy in effect in 1970 was a plan under ERISA, and, therefore, that the event of petitioner's transfer in 1970 was properly treated by the respondent as a break in service

according to said policy. In this manner, the court sought to conform its ruling with section (b)(1)(F) requiring the break-in-service rule to be a part of the plan on the applicable date.

The Third Circuit's interpretation of the policy as a duly qualified pension plan under ERISA is egregiously erroneous. There is nothing in the record to show that the IRS was aware of the Bethlehem policy, and that it had approved it as a qualified pension plan. The legislative history of ERISA and the Congressional policy which led to the enactment of the act readily demonstrate that Congress intended to recognize only break-in-service rules which had been written in the pre-ERISA plans, and to disregard any unwritten policies or practices which were unknown to the IRS and contrary to IRS rules.

The vesting rules of ERISA were intended to apply to all accrued benefits, subject, however, to the break-in-service rules in effect on the applicable date. Petitioner insists that the 17 years of

covered employment in Venezuela must be taken into account in computing the non-forfeitable percentage of service under ERISA, unless petitioner had incurred a break in service under the rules of the plan in effect on the applicable date, section 1053(b)(1)(F). There is no provision in the 1977 Plan, in effect at retirement, which provided that a break in service shall occur if the employee refuses to repay the "C & A" benefit (severance allowance) received by him at the time of his termination in Venezuela. Neither does the 1977 Plan explicitly provide that pension eligibility shall be determined in accordance with the policy in effect at the time of the termination of employment in Venezuela and transfer to another company operation. Because of the silence in the 1977 Plan on the 1970 break-in-service policy, and the absence of the policy as a break-in-service rule in the 1968 Plan, the respondent was precluded from denying pension credits to the petitioner for his covered service in Venezuela on the basis of said policy.

There is a dearth of cases specifically applying section 1053(b)(1)(F). There are nonetheless several decisions which have interpreted the said ERISA provision, but none of them is supportive of -- rather, all are in conflict with -- the decision of the Court of Appeals in this case. One of the cases is from the Third Circuit, albeit a different panel, Tanzillo v. Local Union 617, Int'l. Bd. of Teamsters, 769 F.2d 140 (1985). Tanzillo recognized that the plan in effect at the time an employee files his claim is controlling if that plan document makes no reference to a break-in-service rule of a pre-ERISA plan in effect at the applicable time. In Tanzillo, however, the court found that the plan in effect at the time the pensioner filed his claim required the application of the break-in-service provisions of an earlier plan which was in force at the time of the alleged hiatus from covered employment.

The other decisions which have considered and interpreted section 1053(b)(1)(F) are discussed in Tanzillo. They are

district court cases, Govoni v. Bricklayers Pension Fund, 573 F.Supp. 82 (Mass - 1983); Snyder v. Titus, 513 F.Supp. 916, (E.D.Va.-1981). These cases stand for the proposition that the break-in-service provision in effect at the time the retiree files his claim is controlling, absent a reference in that plan to a different rule for pre-ERISA breaks in service.

In the present case, the earlier plan of 1968 which was in effect in 1970 when the company policy required petitioner to repay his "C & A" benefit or forfeit the credits for the covered employment in Venezuela, did not contain the break-in-service policy or any other break-in-service rule. As a matter of fact, the petitioner had been employed continuously, without any break whatsoever, from the time of his initial employment in 1953 until his retirement in 1980. The break-in-service policy was a mere pretext to recover the "C & A" benefit which the company was mandated by Venezuelan law to pay its employee upon termination of employment in that country. This pretext

is readily evident from the fact that the subject policy was not incorporated in the pension plan prior or subsequent to ERISA. A provision relating to the 1970 policy could have been incorporated easily if that had been the true intention of the drafters of the plan. In absence of any indication of intent on the part of the drafters of the plan, the rational interpretation is that the failure expressly to mention such policy as a break in service in the 1977 Plan, and its predecessor, was intentional. To consider the 1970 policy as a separate plan is simply untenable.

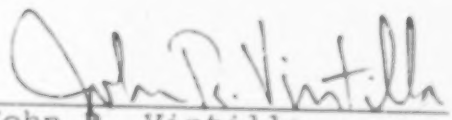
Where the 1977 Plan which was effective at the time of the ruling on the petitioner's claim for pension benefits did not specifically refer the respondent to the 1970 policy regarding the alleged break in service, the respondent's application of the 1970 policy as a break-in-service rule to the petitioner was arbitrary and capricious. Even if some interpretation of the 1977 Plan were required with respect to the 1970 break-in-service

policy, a rule for that period could be no stricter than the definition of a break in service found in Section 5.1 of the 1977 Plan. Thus, the correctness of the decision below is open to serious question.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Third Circuit.

Respectfully submitted,



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APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

L.D. JAMESON	:	CIVIL ACTION
v.	:	
BETHLEHEM STEEL CORPORATION, et al.	:	NO. 83-6006

MEMORANDUM OPINION AND ORDER

HUYETT, J. APRIL 7, 1986

Plaintiff Jameson brought this action pursuant to the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. Section 1001, against his former employer, Bethlehem Steel Corporation, the Pension Plan of Bethlehem Steel Corporation, the Pension Plan of Bethlehem Steel Corporation and Subsidiary Companies ("Pension Plan"), and the General Pension Board which administers the pension plan. He alleges that defendants violated provisions of ERISA by refusing to credit him with service earned while he was employed by Irons Mines Company of Venezuela ("IMCOV"). a subsidiary of Bethlehem Steel Corporation. Presently pending before me are cross-motions for

summary judgment. For the reasons outlined below, I will grant defendants' motion and deny plaintiff's.

The material facts in this case are undisputed. Plaintiff worked for IMCOV from May 5, 1953 to February 28, 1970. When his assignment with IMCOV terminated in 1970, defendant Bethlehem Steel paid him $56,492 in "Cesantia and/or Antiguedades" (C&A"), a form of severance or separation pay provided for under Venezuelan law. On March 1, 1970, plaintiff commenced working for Bethlehem Mines, a subsidiary in Spain.

In 1970, it was defendant Bethlehem's policy that any person who worked in Venezuela and who upon completion of his or her assignment in Venezuela was given the "C&A" payment had to elect either to return the C&A or lose credit, for pension purposes, for their years of service with IMCOV. This policy was reflected in a memorandum dated January 27, 1967 from the Secretary of the General Pension Board to the Vice President of Bethlehem; the memorandum clearly states that an employee who

accepts and does not repay the C&A to the company at the time he is rehired at another Bethlehem operation begins at such other operation as a new employee. This policy existed before 1967, and plaintiff was advised of it in a memorandum dated September 6, 1966. See Defendant's Memorandum, Exhibit 2.

Plaintiff acknowledges that he was aware of Bethlehem's policy with respect to the C&A payments. In February of 1979, plaintiff made arrangements for his resignation from Bethlehem. The final terms of his resignation were encompassed in a written agreement dated March 23, 1979 which in turn incorporated a memorandum dated February 15, 1979. See defendant's memorandum, exhibit 4 and attachment A. The February 15, 1979 memorandum specifically stated that as of his formal resignation and termination on February 29, 1980, plaintiff would have accumulated ten years' continuous service with Bethlehem. Plaintiff signed the March 23, 1979 memorandum, stating his agreement with its terms. Moreover, Bethlehem agreed to

continue plaintiff at half his regular salary from March 1, 1979 to February 29, 1980 to give plaintiff ten years credit and therefore make him eligible for a deferred vested pension.

When plaintiff resigned in 1980, the General Pension Board determined that plaintiff was entitled to a deferred pension, based on ten years of service -- from March 1, 1970 to February 29, 1980. Plaintiff claimed that he should also receive credit for the seventeen years he spent in Venezuela, but the General Pension Board, relying on the company policy in effect in 1970, denied credit for that period. Because plaintiff did not refund the C&A, the Pension Board refused to include the Venezuela years in computing his pension benefits. Plaintiff now alleges that the Pension Board's refusal to include the Venezuelan years in its calculation was in violation of ERISA's provision barring forfeitures after ten years of service. 29 U.S.C., Section 1053(a)(2)(1).

Previously, I granted defendant's

motion for summary judgment on the issue of jurisdiction under ERISA. The Third Circuit reversed and remanded the case for me for further proceedings. See Jameson v. Bethlehem Steel Corporation, 765 F.2d 49 (3d Cir. 1985). The Third Circuit concluded that plaintiff's cause of action arose in 1980 and therefore came within the scope of ERISA's jurisdictional provision. 29 U.S.C., Section 1144(b). The court suggested, however, that state law may govern: "[o]nce jurisdiction has attached, the 'act or omission' provision of Section 514, does no more than inform the court that ERISA's substantive provisions are not to be used to determine the law at the time of incidents occurring before January 1, 1975." 765 F.2d at 52.

What law governs the issues raised by the cross-motions for summary judgment is the first question for me to resolve. Defendants contend that the Third Circuit decision dictates that state law governs the merits of this suit. Plaintiff, on the other hand, contends that his claim is based entirely on ERISA; he claims that

defendants' refusal to credit the plaintiff with the years of service in Venezuela in computing his pension benefits constitutes a violation of the pension plan which is controlling in this case and a violation of section 203(a) of ERISA which prohibits the forfeiture of an employee's rights to his pension once they have vested. Plaintiff also argues that section 402(a)(1) of ERISA, 29 U.S.C., section 1102(a)(1), which provides that every employee benefit plan should be established and maintained pursuant to a written instrument, requires that defendants credit his years in Venezuela.

I agree with plaintiff that he has stated a claim arising under ERISA. Therefore, ERISA must be applied to determine whether plaintiff's pension rights were nonforfeitable[1]. However, to the extent of acts or policies in effect prior to

---

1. Defendants raise a number of defenses under state law such as equitable estoppel and laches. Because I conclude that ERISA governs plaintiff's claim, I will not address these defenses.

1975, the effective date of ERISA, are determinative of the outcome here, ERISA will not govern. I cannot apply the rules and restrictions of ERISA to acts or policies predating ERISA's effective date.

The starting point is to examine which of ERISA's substantive provisions govern plaintiff's claim -- a claim based on an employment history prior to January 1, 1975 but filed after that date. Section 203 of ERISA, 29 U.S.C. Section 1053 govern the vesting of pensions, and plaintiff relies on subsection (a)(2)(A) in claiming that his pension rights were nonforfeitable[2]. Subsection (b)(1)(F) provides, however, that certain periods of time may

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2. Section 203(a)(2)(A) of ERISA provides:

> Each pension plan shall provide that an employee's right to his normal retirement benefit is nonforfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements (1) and (2) of this subsection.
>
> (2) A plan satisfies the requirements of this paragraph if it satisfies the requirements of subparagraph (A),(B), or (C).
>
> (A) A plan satisfies the requirements

not be included in calculating the nonforfeitable percentage under subsection (a)(2):

> (1) In computing the period of service under the plan for purposes of determining the nonforfeitable percentage under subsection (a)(2) of this section, all of an employee's years of service with the employer or employers maintaining the plan shall be taken into account, except that the following may be disregarded:
>
> (F) years of service before this part first applies to the plan if such service would have been disregarded under the rules of the plan with respect to breaks in service, as in effect on the applicable date;

As the Third Circuit, in Tanzillo v. Local Union 617, 769 F.2d 140,145 (3d Cir. 1985), recently noted:

> ERISA thus explicitly recognizes break-in-service forfeiture of those credits which had been accrued prior to the effective date of ERISA, if such break-in-service forfeiture is provided for in the applicable plan document.

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2. Continued.

> of this subparagraph if an employee who has at least 10 years of service has a nonforfeitable right to 100 percent of his accrued benefit from employer contributions.

Therefore, if plaintiff had a break in service under the applicable pension plan, his claims fail.

In Tanzillo, the court concluded that under the plan in effect at the time Tanzillo filed his claim, i.e. the 1978 plan, pension eligibility was to be determined under the terms of the plan in effect at the time of the alleged break in service. Application of the earlier plan, the court concluded, was consistent with section 203(b)(1)(F) of ERISA which expressly provides for the forfeiture of accrued credits for a break in service "under the rules of the plan with regard to breaks in service, as in effect on the applicable date." The court then determined that under the 1962 pension plan, Tanzillo had a break in service which caused him to forfeit previously accrued pension credits.

Applying a similar analysis in this case, I look first to the plan in effect at the time plaintiff filed his pension claim in 1980, the 1977 Plan. The 1977 Plan provides benefits for all eligible employees based on their "continuous

service." Section 5.1 of the Plan provides in pertinent part:

> The term "continuous service" as used in this Plan means continuous service in the employ of one or more of the Employing Companies, except as in this Section 5 otherwise provided, prior to retirement calculated from the Employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this Plan shall be based on the practices in effect at the time the break occurred.

Therefore, continuous service for purposes of the 1977 Pension Plan is measured from the employee's last hiring date to the date of his retirement. Breaks in service after the effective date of the Plan occur when an employee quits, is discharged, is terminated because of a plant shutdown, or is absent for more than two years. However, the proviso in section 5.1 states that the last hiring date prior to the effective date of the Plan shall be based on the

practices in effect at the time the break occurred.

Defendants contend that based on the practices then in effect, plaintiff's last hiring date was March 1, 1970 when he started work for the Bethlehem subsidiary in Spain. Plaintiff was considered a new employee in 1970 because he had elected to receive and keep the C&A payment. It was an established policy, reflected in the January 17, 1967 memorandum by G.W. Vary, that if a person who received and retained a severance allowance like the C&A, were rehired by Bethlehem or one of its subsidiaries, he or she would be considered a "new employee" and would not receive credit for any previous employment. It appears, therefore, that plaintiff had a break in service in 1970 which is fatal to his claim for pension credit for the period 1953-1970.

Plaintiff, however, contends that the policy regarding the C&A payments and forfeiture of pension credit had to be included in writing in the Pension Plan in order to be valid. In support of this contention,

plaintiff relies on the language in Tanzillo to the effect that ERISA recognizes pre-ERISA breaks in service, "if such break-in-service forfeiture is provided for in the applicable plan document." 769 F.2d at 145. Plaintiff also apparently relies on section 402 of ERISA, 29 U.S.C. Section 1102, which states that every employee benefit plan shall be established and maintained pursuant to a written instrument. Plaintiff contends that the policy with respect to C&A payments should have been set forth in writing, if not in the 1968 plan, then definitely in the 1977 plan, and that the 1967 memorandum is insufficient.

I find that plaintiff's contentions fail. First, plaintiff's reading of Tanzillo is unduly restrictive. Admittedly, no plan sets forth the policy regarding C&A payments which was in effect in 1970, five years before ERISA went into effect. However, the 1977 Plan specifically states that the last hiring date before the effective date of the Plan will be determined by the policies in effect at the time of

the break. In this instance, one refers to policies which defendants had established and put into effect before the effective date of ERISA. I do not think Tanzillo requires pre-ERISA policies to be embodied in a written plan[3].

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3. I have reviewed plaintiff's counsel's letter dated March 28, 1986 which I have docketed. Counsel argues that under Tanzillo, the applicable plan is the 1968 Salaried Pension Plan. As I have noted, however, under Tanzillo, a reviewing court looks first to the plan in effect at the time the plaintiff filed his pension claim, which, in this case is the 1977 plan. In Tanzillo, the 1978 plan referred the court to the earlier plan; in this case, the 1977 plan refers me to the policies in effect at the time of the "break." Although I would agree with plaintiff that the policy would have to be incorporated into the pension plan after the effective date of ERISA, I do not believe I can impose such a rule on a policy which was in writing and which was applied consistently and with plaintiff's full knowledge before the effective date of ERISA. Plaintiff was a new employee as of March 1, 1970.

Moreover, looking to the 1968 plan, section 5.1 of the Plan states in pertinent part:

> The number of years of continuous service of any participant shall be conclusively determined for all purposes of this Plan by the General Pension Board.

The General Pension Board clearly established its policy with respect to the C&A payments as early as 1967 as reflected in the January 27, 1967

Similarly, section 402 of ERISA, requiring all terms and policies governing pension plans to be in writing, cannot be applied to plans before the effective date of ERISA. To hold otherwise would be to apply ERISA retroactively which is exactly what the Third Circuit in this case said could not be done. The "'act or omission' provisions is a direction as to choice of law and is intended to ensure that ERISA is not applied retroactively." 765 F.3d at 51. Therefore, I conclude that consistent with section 203(b)(1)(F) of ERISA, plaintiff had a break in service in 1970 when he accepted and retained the C&A payment and that he forfeited the seventeen years of pension credit which he had accrued between 1953 and 1970.

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3. Continued.

memorandum from the Secretary of the General Pension Board, G.C. Vary to the Vice President of Bethlehem. There would be a break in service if the employee receiving the C&A payment elected not to return it. Therefore, the General Pension Board's handling of plaintiff's claim is consistent with the 1968 plan and the Board's policies.

If the events in this case had all occurred after the effective date of ERISA, i.e., plaintiff has worked in Venezuela until 1977, accepted and retained the C&A in 1977, and then worked for ten years before filing a claim for a pension, the outcome of this case might be different. First, the provision requiring written plans would govern and the policy governing C&A payments would have to be set forth in writing. More importantly, section 203(b)(1)(F) of ERISA would not govern because the "break" in service would have occured after the effective date of ERISA.

In reviewing the Pension Board's determination to deny plaintiff benefits under the terms of the plan, I must defer to the Board's determination so long as its interpretation of the plan is neither arbitrary nor capricious. Tanzillo, 769 F.2d at 147. Because I conclude that the 1977 plan requires the policies in effect at the time of the break be applied and because the policy pertaining to C&A payments was clearly established and was

aware of the policy, the Board's interpretation of the Plan and the break-in-service rule is neither arbitrary nor capricious.

An appropriate order follows.

/s/
Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

L.D. JAMESON	:	CIVIL ACTION
v.	:	
	:	NO. 83-6006
BETHLEHEM STEEL CORPORATION, et al.	:	

ORDER

NOW, April 7, 1986, upon consideration of the cross-motions for summary judgment, the memoranda of law submitted by the parties, the arguments made orally by the parties, and for the reasons stated in the accompanying memorandum opinion, IT IS ORDERED that defendants' motion for summary judgment is GRANTED and plaintiff's motion for summary judgment is DENIED.

Judgment is entered in favor of defendants and against plaintiff.

/s/
Daniel H. Huyett, 3rd, Judge

(Entered: 4/9/86; Clerk of Court)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

L.D. JAMESON	:	CIVIL ACTION
v.	:	
	:	NO. 83-6006
BETHLEHEM STEEL CORPORATION, et al.	:	

CIVIL JUDGMENT

Before HUYETT, J.

AND NOW, this 8th day of April, 1986, in accordance with the order dated April 7, 1986,

IT IS ORDERED that Judgment be and the same is hereby entered in favor of the defendants and against the plaintiff.

BY THE COURT:

(Entered: 4/9/86)

ATTEST: Francis E. DeVine
Deputy Clerk

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1242

JAMESON, L.D.

Appellant

v.

BETHLEHEM STEEL CORPORATION
PENSION PLAN OF BETHLEHEM STEEL CORPORATION
AND SUBSIDIARY COMPANIES, also known as
BETHLEHEM 1977 SALARIED PENSION PLAN
GENERAL PENSION BOARD, BETHLEHEM STEEL
CORPORATION AND SUBSIDIARY COMPANIES

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
District Judge: Hon. Daniel H. Huyett, 3rd

Submitted Under Third Circuit Rule 12(6)
September 11, 1986

Before: ALDISERT, Chief Judge, HIGGINBOTHAM,
and HUNTER, Circuit Judges

Opinion filed September 26, 1986

MEMORANDUM OPINION

HUNTER, Circuit Judge:

1. L.D. Jameson worked for Iron Mines Company of Venezuela, a subsidiary of Bethlehem Steel Corporation ("Bethlehem") from May 5, 1953 to February 28, 1970. On March 1, 1970, Jameson was transferred to a Bethlehem subsidiary in Spain where he worked until 1980. Bethlehem, as required by Venezuela law, paid Jameson $56,492 in severance pay (known as "Cesantia and Antiguedades") when he finished his work in Venezuela.

2. Consistent with Bethlehem policy at that time, Bethlehem offered Jameson the option of either returning the severance pay and receiving pension credit for those seventeen years, or of keeping the severance pay and being treated as a new employee for pension purposes. Jameson chose to keep the severance pay. This policy of giving the employee an option regarding severance pay was not part of a distributed and printed pension plan. However, it was embodied in various memoranda and Jameson knew about the policy.

3. Jameson resigned and applied for pension benefits in 1980. Bethlehem considered him eligible for benefits as an employee with 10 years of service. Jameson complained to the Bethlehem Pension Board requesting that his years in Venezuela be credited to his pension. The Pension Board refused to credit those years because it considered him a new employee as of 1970 due to his failure to return the severance pay.

4. Jameson brought suit in the United States District Court for the Eastern District of Pennsylvania under section 203(b)(F) of the Employee Retirement Security Act ("ERISA"), 29 U.S.C. Section 1053(b)(F) (1982). That court initially granted Bethlehem's motion for summary judgment on jurisdictional grounds. This court reversed and remanded. See Jameson v. Bethlehem Steel Corp. Pension Plan of Bethlehem Steel and Subsidiary Cos., 765 F.2d 49 (3d Cir. 1985).

5. On remand, Jameson argued that an employer cannot disregard an employee's pre-ERISA years of service unless it does

so pursuant to a written pension plan. Since Bethlehem's policy of treating Venezuelan workers as new employees unless they returned their severance pay was not part of Bethlehem's written pension plan, Jameson argued that ERISA precluded Bethlehem from not crediting him for those years.

6. The district court considered motions for summary judgment by both parties. It held that ERISA does allow an employer to rely on a pre-ERISA policy which was not part of a written pension plan but which defined a break in service to disregard years of service for pension purposes. Therefore, the court awarded Bethlehem summary judgment.

7. In reviewing a district court's award of summary judgment, an appellate court must apply the same test that the district court should have applied. See Koshatka v. Philadelphia Newspapers, Inc., 762 F.2d 329, 333 (3d Cir. 1985). The district court held for Bethlehem because it found that the Pension Board did not act arbitrarily or capriciously when it relied on

the severance policy to deny Jameson's claim for pension credit. See Tanzillo v. Local Union 617, Int'l Brd. of Teamsters, 769 F.2d 140, 147 (3d Cir. 1985) (standard of review of a pension board is arbitrary or capricious). We agree. However, we reach this result by looking to a different pension plan than that considered by the district court.

8. ERISA requires that all of an employee's years of service with an employer be credited in computing his pension eligibility, subject to a few limited exceptions. See ERISA Section 203(b), 29 U.S.C. Section 1053(b) (1982). An employer may disregard those years of service before ERISA's effective date of January 1, 1976 if those years could have been disregarded under "the rules of the plan with regard to breaks in service, as in effect on the applicable date." ERISA Section 203(b)(F), 29 U.S.C. Section 1053 (b)(F) (1982). "Plan" with respect to pension plans, refers to "any plan, fund or program" established to provide retirement income. See ERISA Section 3(3), (2)(A), 29 U.S.C. Section 1002(3), 2(A) (1982).

"Applicable date" is not defined by the statute.

9. At the time of Jameson's alleged break in service in 1970, a 1968 pension plan was in effect at Bethlehem. A 1977 plan was in effect in 1980 when Jameson retired and applied for benefits. The 1968 plan provided that pension benefits would accrue during "continuous service," but did not define continuous service or a break in service. The 1977 plan also provided that pension benefits would accrue during continuous service with such service to be measured from the last hiring date. With respect to an alleged break in service occurring after the 1977 plan went into effect, the plan listed which employee actions constituted a break in service. If a break in service occurred, an employee's last hiring date would be determined to occur after that break. The 1977 plan provided that the last hiring date of a person who experienced an alleged break in service before the 1977 plan went into effect should be

determined by "the practices in effect at the time the break occurred."[1]

10. Jameson contends that the provision on "practices in effect at the time the break occurred" comes into effect only after it is determined that an employee experienced a break in service as defined in the 1977 plan. This is incorrect, since the 1977 plan explicitly states that pre-1977 practices should be used to determine a pre-1977 last hiring date.

11. The case law is unclear regarding which pension plan should apply to

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1. The 1977 plan stated:

SECTION 5. DETERMINATION OF CONTINUOUS SERVICE

The term "continuous service" as used in this Plan means continuous service in the employ of one or more of the Employing Companies, except as in this Section 5 otherwise provided, prior to retirement calculated from the Employee's last hiring date (this means in the case of a break in continuous service, continuous service shall be calculated from the date of reemployment following the last unremoved break in continuous service) in accordance with the following provisions; provided, however, that the last hiring date prior to the effective date of this Plan shall be based on the practices in effect at the time the break occurred.

Jameson's claim. The district court determined that Tanzillo requires a court to look to the plan in effect at the time of retirement. In Tanzillo, the court relied on two district court cases which had held that, in general, the plan in effect at retirement should control a pension claim. See Tanzillo, 769 F.2d at 146 (referred to Govoni v. Bricklayers Int'l Union of America, Local No. 5 Pension Fund, 573 F. Supp. 82 (D. Mass. 1983), aff'd, 732 F.2d 250 (1st Cir. 1984); Snyder v. Titus, 513 F.Supp. 926 (E.D. Va. 1981). The court in Govoni reasoned that, since many revised plans include rules with a retroactive effect, it would frustrate the intent of the parties to ignore the new plan. See Govoni, 573 F.Supp. at 85. The court in Snyder reasoned that it is logical to use the plan in effect at retirement absent a showing that that would be arbitrary or capricious. See Snyder, 513 F.Supp. at 931-32. Neither of these arguments convinces us that the plan in effect at the date of retirement should apply in this case.

12. Tanzillo does not require us to use the plan in effect at the time of retirement. The court in Tanzillo was not particularly concerned with the issue because the plan in effect at retirement referred back to the earlier plan when considering events prior to the effective date of the later plan. We need not be overly concerned with the issue since the 1977 plan refers to prior practices for prior events, making the 1968 plan controlling whether we begin our analysis with the 1968 plan or the 1977 plan. We note, however, that we believe our analysis should begin with the 1968 plan. The 1977 plan is not retroactive, nor does either party argue that it should be.

13. Our analysis, therefore, begins with ERISA SEction 203(b)(F), 29 U.S.C. Section 1053(b)(F), which we believe directs us to the 1968 plan as "the plan in effect at the applicable date." Since Bethlehem's severance pay policy was not past of the 1968 written pension plan, the issue we must decide is whether that

policy is, nevertheless, part of the "plan in effect" in 1970.

14. As Bethlehem points out, ERISA cannot be used to determine pre-ERISA law. See Jameson, 765 F.2d at 52. However, since ERISA specifically directs us to a "plan," we must look to post-ERISA law for the limited purpose of determining what constitutes a "plan." Pre-ERISA definitions of the word "plan" would not be relevant here because ERISA initiated the technical use of the word.

15. The words of ERISA seem to allow a separate severance policy to be included within the meaning of a pension plan. A pension plan is defined under ERISA as "any plan, fund, or program" established to provide retirement income. See ERISA Section 3(3), (2)(A), 29 U.S.C, Sections 1002(3), (2)(A) (1982). Bethlehem's severance policy acted to give an employee a choice of being paid his severance at transfer or at retirement, and seems to be a "program" providing retirement income within the statute.

16. Severance policies have been interpreted to be "plans" in another context. Such policies are plans for the purposes of whether they must comply with ERISA requirements. See Jung v. FMC Corp., 755 F.2d 708, 710 (9th Cir. 1985); Sly v. P.R. Mallory and Co., 712 F.2d 1209, 1213 (7th Cir. 1983) (severance policy separate from written pension plan is part of "plan" for purposes of ERISA). In the context of those cases, such an interpretation serves to further protect the employee's pension rights. While such an interpretation in the context of the present case serves to deny Jameson his claim, it will not deprive him of the severance he was already paid and cannot, therefore, be said to violate ERISA. See Pension Benefit Guaranty Corp. v. R. A. Gray and Co., 104 S. Ct. 2709 (1983) (purpose of ERISA is to protect employees' promised benefits).[2]

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2. Interestingly, if we were to analyze Jameson's claim as the district court did, by going through the 1977 plan to the 1968 plan rather than directly, it would be even harder for Jameson to prove his case. Since the 1977 plan directs the reader to the "practices in effect" at the prior date, the

17. We conclude that the severance policy was a plan for the purposes of ERISA and that Bethlehem correctly used it to treat the 1970 transfer as a break in service. We will affirm the district court award of summary judgment to Bethlehem.[3]

TO THE CLERK:

Please file the foregoing opinion.

JAMES HUNTER, III, Circuit Judge

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2. Continued.

severance policy would be unambiguously included in the analysis.

3. Because we have affirmed in favor of Bethlehem, we need not reach Bethlehem's common-law defenses.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-1242

JAMESON, L.D.

Appellant

v.

BETHLEHEM STEEL CORPORATION
PENSION PLAN OF BETHLEHEM STEEL CORPORATION
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GENERAL PENSION BOARD, BETHLEHEM STEEL
CORPORATION AND SUBSIDIARY COMPANIES

On Appeal from the United States District
Court for the Eastern District
of Pennsylvania
D.C. Civil No. 83-6006
District Judge: Hon. Daniel H. Huyett, 3rd

Before: ALDISERT, Chief Judge, HIGGINBOTHAM,
and HUNTER, Circuit Judges

JUDGMENT

This cause came to be considered on the record from the United States District

Court for the Eastern District of Pennsylvania and was submitted September 11, 1986.

On consideration whereof, it is now ordered and adjudged by this Court that the order of the District Court entered April 7, 1986 be, and the same is hereby, affirmed.

Costs taxed against appellant.

ATTEST:

/S/ Sally Mrvos
Clerk

September 26, 1986